

OHIO STATE LAW JOURNAL

Volume 44, Number 1, 1983

Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response

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Mr. Michael Curtis has performed a service to scholarship by pointing out that my attribution of certain remarks to Senator William Fessenden was wrong, that they were uttered by Senator Garrett Davis, a bitter opponent of the efforts to ameliorate the Negro lot and hence carry no weight.¹ How did I err so grievously? In Alfred Avins' reprint the remarks appear immediately below those made by Senator Fessenden, and I overlooked the legend at the side naming Davis as the speaker.² To explain is not to extenuate, for scholars are under the duty of the utmost exactitude; their dreams are haunted by the possibility of just such an oversight. To Curtis' credit, he does not follow in the footsteps of his oracle, William Crosskey, and charge me with manufacturing some evidence to bolster a lost cause.³ Unfortunately, the remainder of Curtis' article is not equally happy, exhibiting anew his incapacity to weigh historical evidence and his frequent incomprehension of what he reads, as will appear.

I. WILLIAM CROSSKEY

Curtis continues to rely heavily on Crosskey and chides me for "totally ignor[ing]" a "major article" because of blistering reviews of the two-volume work Crosskey published one year earlier.⁴ To those reviews he replies that "Professor Goebel and the other commentators . . . wrote not about Crosskey's article . . . but about his book . . ."⁵ As if a leopard can change his spots! Charles Fairman, whose fastidious scholarship is widely respected,

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1. Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 103 (1982) [hereinafter cited as Curtis, *Further Adventures*]. His initial article, Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980), is hereinafter cited as Curtis, *Bill of Rights*. For my reply, see Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) [hereinafter cited as Berger, *Incorporation*].

The error, while deplorable, does not vitiate my conclusion, for it is only one bit in a mass of evidence.

2. A. AVINS, *THE RECONSTRUCTION AMENDMENTS DEBATES* 232-33 (1967).

3. For example, Crosskey charged that Daniel Call (the reporter of *Commonwealth v. Caton*, 4 Call 5 (Va. 1782)), reporting 45 years after the case was decided, "was simply manufacturing, in ex-post-facto manner, a little much needed pre-Constitutional usage" to bolster the theory of judicial review. W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 960 (1953). The historical facts disprove the charge. 2 D. MAYS, *EDMUND PENDLETON* 196 (1952). Henry Hart commented on Crosskey's "readiness . . . to impute lack of scruple to others, wholesale." Hart, Book Review, 67 HARV. L. REV. 1456, 1481 (1954).

4. Curtis, *Further Adventures*, *supra* note 1, at 91.

5. *Id.* at 90.

did write about the Crosskey article and concluded that Crosskey's "pre-possessed obtuseness to the elementary requirements of scholarly candor is the most significant feature of his entire work."⁶

Nor was I alone in "ignor[ing] Crosskey." Justice Black, who fathered the incorporation theory in his famous dissent in *Adamson v. California*,⁷ writing 14 years "after Crosskey's article," Curtis notices, "unfortunately did not cite Crosskey."⁸ Black, who clung to his theory despite the Court's obdurate rejection,⁹ would have been eager to embrace any solid confirmation. His omission to cite Crosskey's passionate elaboration of his theory testifies that Black did not share Curtis' confidence in Crosskey's scholarship. And concerning the subject of "ignor[ing]," Curtis nowhere has mentioned Fairman's deadly reply to Crosskey,¹⁰ though I called his attention to the fact that "Fairman reduced Crosskey's 'case' to rubble."¹¹

Since, however, Curtis charged that in ignoring Crosskey's article I failed "to come to grips with the *strongest case* which has been made against [my] view,"¹² and because the idols a man worships reveal something of the man himself, I shall comment on a Crosskey sample that reveals him to be an untrustworthy scholar. As early as *Barron v. Baltimore*¹³ Chief Justice Marshall held that the Bill of Rights did not extend to the states, saying that so momentous a change would have been clearly expressed.¹⁴ Crosskey dismisses Marshall's opinion as "*without any warrant at all.*"¹⁵ John Hart Ely recently wrote, however, "In terms of the original understanding, *Barron* was almost certainly decided correctly."¹⁶ Several facts illustrate the original understanding.

6. Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144, 145 (1954).

7. 332 U.S. 46, 68 (1947) (Black, J., dissenting).

8. Curtis, *Bill of Rights*, *supra* note 1, at 49 n.22. Curtis remains wedded "to Professor Crosskey's interpretation, which, unlike others, makes sense out of the debates." *Id.* at 64 n.137.

9. Justice Frankfurter, speaking for the Court in *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959), stated "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

See also McClellan, *The Making and Unmaking of the Establishment Clause*, in A BLUEPRINT FOR JUDICIAL REFORM 295, 314 (McGuigan & Rader eds. 1981).

10. Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

11. Berger, *Incorporation*, *supra* note 1, at 437 n.19. Instead, Curtis wrote, "Fairman's later *History of the Supreme Court . . . Reconstruction and Reunion, 1864-88* (1971) also ignored Crosskey's article." Curtis, *Bill of Rights*, *supra* note 1, at 50 n.32.

If ignoring Crosskey is sinful, why does Curtis cite Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979), Curtis, *Bill of Rights*, *supra* note 1, at 86 n.317, without so much as a "but see" to my reply, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427 (1981)? For a constitutional law professor's rejection of Soifer's critique, see Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981).

12. Curtis, *Bill of Rights*, *supra* note 1, at 50 (emphasis added).

13. 32 U.S. (7 Pet.) 243 (1833).

14. *Id.* at 250.

15. 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1067 (1953) (emphasis added).

16. J. ELY, DEMOCRACY AND DISTRUST 196 (1980).

To begin with, the first amendment provides “*Congress* shall make no law”—Congress, not the states. The legislative history clearly confirms Marshall. Madison had urged the First Congress to extend the protection of the first amendment to the states, saying that “the State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against”;¹⁷ but he was voted down. Speaking about freedom of speech and press, Egbert Benson said that all the Committee of Eleven to whom the amendments had been referred “meant to provide against was their being infringed by the [Federal] Government.”¹⁸ In presenting the amendments Madison explained that “the abuse of the powers of the General Government may be guarded against in a more secure manner”¹⁹ And he added, “If there was reason for restraining the State Governments [by state constitutions] from exercising this power, there is like reason for restraining the Federal Government.”²⁰ The prevailing view was voiced by Thomas Tucker: “It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do”²¹ That Curtis continues to rely on Crosskey in the face of this evidence of his wrong-headed categorical pronouncements speaks volumes about the caliber of Curtis’ own scholarship.²²

II. AMENDMENT AND CIVIL RIGHTS ACT WERE “IDENTICAL”

Curtis’ unwillingness to face up to unpalatable facts mirrors Crosskey and is quickly illustrated by his response to the question whether the Civil Rights Act and the fourteenth amendment were identical. The Civil Rights Act of 1866 banned discrimination with respect to certain enumerated rights: the right “to make and enforce contracts, to sue . . . [to] hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property.”²³ As the Supreme Court stated one hundred years later, “The legislative history of the 1866 Act clearly indicates that Congress intended to protect a *limited category* of rights”²⁴ The Civil Rights Act was regarded as identical with the amendment, the latter being designed to protect the Act from repeal and to embody it in the amendment.²⁵ Harry Flack, a devotee of a broad construc-

17. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 134–35 n.4 (1977) (quoting 1 ANNALS OF CONG. 458 (1789)) (J. Gales ed. 1836) (print with running title “History of Congress”) [hereinafter cited as BERGER, *GOVERNMENT*]. In urging rejection of the Constitution the minority of the Pennsylvania Ratification Convention stressed that it lacked a provision that “freedom of the press shall not be restrained by any law of the United States,” not of a state. C. KENYON, *THE ANTIFEDERALISTS* 36 (1966).

18. 1 ANNALS OF CONG. 759 (1789) (J. Gales ed. 1836) (print with running title “History of Congress”).

19. *Id.* at 449–50.

20. *Id.* at 456.

21. *Id.* at 783.

22. For citations to other examples of Crosskey’s ill-founded dogmatism, see Berger, *Incorporation*, *supra* note 1, at 436 n.17.

23. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

24. *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (emphasis added).

25. For a more detailed discussion, see BERGER, *GOVERNMENT*, *supra* note 17, at 22–23.

tion of the amendment, wrote, "[N]early all said that it was but an *incorporation* of the Civil Rights Bill."²⁶ Martin Thayer assured the framers that the amendment "is but incorporating in the Constitution . . . the principle of the civil rights bill which has lately become a law."²⁷ Responding to his own question—"[W]hy should we put a provision in the Constitution which is already contained in an act of Congress?"—John Broomall said that because of doubts expressed about the constitutionality of the Act he wished "to make assurance doubly sure" and "to prevent a mere majority from repealing the law."²⁸ Curtis waters these statements down: "*Some* speakers did treat the amendment as a reiteration of the Civil Rights Bill."²⁹ No such statement was ever questioned or contradicted. Why did not a single alleged proponent of the Bill of Rights protest that reiteration of such remarks would bar the door to incorporation?

Curtis lamely urges that "[m]ost of the statements . . . do not indicate that the measures were *completely* identical."³⁰ That would have been supererogatory, for "identical" is defined as "absolutely the same."³¹ Curtis cites only one allegedly contradictory utterance: Thaddeus Stevens "denied that the amendment and the Civil Rights Bill were identical. That was, as he said, only 'partly true'!"³² This citation is a misleading paraphrase of Stevens' comments: "Some answer, 'your civil rights bill secures the same things.' That is partly true, but *a law is repealable* by a majority."³³ Of course Act and amendment were not identical in this respect. Weighing against Curtis' dubious gloss of Stevens are some unequivocal statements. George Latham stated the Act "covers *exactly* the same ground as this amendment."³⁴ Henry Raymond said that Congress proposed the Civil Rights Bill "to exercise *precisely* the powers which that [the Bingham] amendment was intended to confer."³⁵ So it was understood by a contemporary of the amendment, Justice Bradley: "[T]he first section of the bill covers the *same* [a synonym for identical] ground as the fourteenth amendment."³⁶

Curtis argues that if "the amendment and the bill were identical," it "follows that the Civil Rights Bill contained a *federal* standard of due process."³⁷ That "standard," be it remembered, was procedural, not sub-

26. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908) (emphasis added). The original bill is set out in BERGER, GOVERNMENT, *supra* note 17, at 24.

27. CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866) [hereinafter cited as GLOBE].

28. *Id.* at 2498.

29. Curtis, *Further Adventures*, *supra* note 1, at 105 (emphasis added).

30. *Id.* at 104 (emphasis added).

31. FUNK & WAGNALL'S DESK STANDARD DICTIONARY (1946); The *Oxford Universal Dictionary* defines "identical" as "the very same." OXFORD UNIVERSAL DICTIONARY (3d ed. 1934).

32. Curtis, *Further Adventures*, *supra* note 1, at 104 (quoting GLOBE, *supra* note 27, at 2459).

33. GLOBE, *supra* note 27, at 2459 (emphasis added).

34. *Id.* at 2883 (emphasis added).

35. *Id.* at 2502 (emphasis added).

36. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408).

37. Curtis, *Further Adventures*, *supra* note 1, at 106 (emphasis added).

stantive.³⁸ James Garfield, a framer who had restudied the debates of the 39th Congress, said in 1871 that the due process clause of the fourteenth amendment secured "an impartial trial according to the laws of the land."³⁹ Since the object of the Act merely was to secure blacks against discrimination, not to displace undiscriminatory state law, that interpretation meant the "standard" of the state.⁴⁰ That was made plain by Samuel Shellabarger: the Bill "neither confers nor defines nor regulates any right whatever"; that would "be an assumption of the reserved rights of the States and the people." It secures "equality of protection in those enumerated civil rights *which the States may deem proper to confer upon any races.*"⁴¹ Twice Senator Trumbull spoke to the same effect.⁴²

Another Curtis argument is that the Civil Rights Bill (as did the Act) provided "for security of person and property," which would comprehend the due process clause of the fifth amendment and other provisions of the Bill of Rights.⁴³ That overlooks Thayer's assurance that the items enumerated in the Bill precluded extension "beyond the particulars which have been enu-

38. See R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 18-28 (1982).

In 1871 Judge William Lawrence, who also had been a framer of the fourteenth amendment, quoted Alexander Hamilton: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice. They can never be referred to an act of the Legislature." CONG. GLOBE, 41st Cong., 3d Sess. 1245 (Feb. 1871). Curtis disingenuously renders my citation of Hamilton as "Berger says that 'due process applied only to judicial proceedings, never to action by a legislature . . .'" Curtis, *Further Adventures*, *supra* note 1, at 112 n.170 (emphasis added). Even Crosskey stated that "[t]he fantastic modern development known as 'substantive due process' lay in the future; and there is, therefore, no more actual warrant for this doctrine, as against the states, under the Fourteenth Amendment . . ." Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 6 (1954).

39. CONG. GLOBE APP., 42d Cong., 1st Sess., 153 (1871). I have searched the records of the Reconstruction Congresses and found no broader definitions or objections that the definitions of Lawrence and Garfield were too narrow. Substantive due process was a judicial fabrication of later times, which the Court itself has repudiated. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963). Against this evidence Curtis says that both *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (an opinion the Republicans despised), and "the Republican party platforms of 1856 and 1860 read the clause as a limit on the legislature," Curtis, *Further Adventures*, *supra*, note 1, at 112 n.170, as if earlier party platforms bear on the intention of the legislators in 1866 and overrule accepted judicial interpretations. Bingham himself referred one who asked for the meaning of due process to the cases: "the courts have settled that long ago." GLOBE, *supra* note 27, at 1089. For the views of the 39th Congress, see BERGER, *GOVERNMENT*, *supra* note 17, at 201-08.

40. For example:

[T]he due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. . . . For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial.

Adamson v. California, 332 U.S. 46, 54 (1947). To be sure, the Court has since repudiated its earlier decisions as part of its ongoing revision of the Constitution; but as Judge Henry Friendly pointed out, no historical basis exists for picking and choosing which portions of the Bill of Rights are to bind the states—the "selective incorporation" approach. See *infra* text accompanying note 81. See R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 15-18 (1982).

41. GLOBE, *supra* note 27, at 1293 (emphasis added).

42. Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, stated that if a state did not discriminate the Bill "will have no operation whatever in any State where the laws are equal." *Id.* at 476. And he later reiterated that it "in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property." *Id.* at 1761.

43. Curtis, *Further Adventures*, *supra* note 1, at 105-06.

merated,"⁴⁴ an application of the familiar maxim *expressio unius exclusio alterius*. Notwithstanding, Curtis says, "Why Wilson would have considered the right to due process as enforceable by the federal government, but not other rights found in the Bill of Rights . . . Mr. Berger does not explain."⁴⁵ The "due process clause" may be understood to subsume the Civil Rights Act provision for the right "to sue, be parties, and give evidence." No comparable provision of the Act reached out to other portions of the Bill of Rights. He himself notes that Bingham's attempt to insert the fifth amendment's companion "just compensation" clause was rejected.⁴⁶ Explicit rejection of that clause militates against an assumption that the rest of the Bill of Rights was implicitly adopted. Curtis regards as an "obvious" fallacy the assumption "that a man who had accepted any abolitionist ideas—for example, protection of the rights in the Bill of Rights and black citizenship—must accept all,"⁴⁷ for instance, "suffrage for blacks and integration."⁴⁸ By the same token, acceptance of one clause does not signify acceptance of the entire Bill of Rights. Then too, the Framers of the Bill of Rights were guilty of egregious supererogation if the words "due process" in the fifth amendment encompassed the rest of the carefully drafted amendments. Why an elaborate Bill of Rights if the due process clause of the fifth amendment covered the ground completely?

Curtis concludes, "The *inescapable* implication of the assertion that the Civil Rights Bill and section one of the fourteenth amendment were *identical* is that at least some rights in the Bill of Rights applied to the states prior to the passage of the fourteenth amendment."⁴⁹ That inference was categorically rejected by the *Slaughter-House Cases*,⁵⁰ and it runs counter to Wilson's and Thayer's assurances that the Civil Rights Bill covered only "the specific

44. GLOBE, *supra* note 27, at 1151; *see also infra* text accompanying note 64.

45. Curtis, *Further Adventures*, *supra* note 1, at 100-01.

46. *Id.* at 113 n.179. Curtis would remove the curse from this rejection by citing an 1897 case that held "just compensation" was within the due process clause, *id.* (citing *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897)), but that decision is only another instance of the Court adding what the framers unmistakably excluded.

47. Curtis, *Further Adventures*, *supra* note 1, at 111.

48. *Id.*

49. *Id.* at 106. (emphasis added for "inescapable").

50. 83 U.S. (16 Wall.) 36, 96 (1872). Speaking of privileges or immunities, *Adamson v. California*, 332 U.S. 46, 51-52 (1947), declared, "The *Slaughter-House Cases* decided, . . . that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view . . . has approved this determination." And the *Adamson* Court added, "It is the construction placed upon the amendment by justices *whose own experience* had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment." *Id.* at 53 (emphasis added). Respect for a contemporaneous construction was expressed as long ago as 1454. *See Windham v. Felbridge*, Y.B. 33 Hen. 4, f.38, 41, pl. 17, quoted in C. K. ALLEN, *LAW IN THE MAKING* 193 (6th ed. 1958).

Curtis shrugs off *Slaughter-House Cases*: "Both Mr. Berger and I agree that it was incorrectly decided." Curtis, *Further Adventures*, *supra* note 1, at 121. But our grounds are very different. In unduly narrowing the scope of the fourteenth amendment by confining it to privileges of a citizen of the United States, Justice Miller overlooked the reason for this citizenship: it was added to still the controversy over Negro citizenship—the heritage of *Dred Scott*—not to alter the *content* of privileges or immunities, which was identical with the several privileges enumerated in the Civil Rights Act. BERGER, *GOVERNMENT*, *supra* note 17, at 44-49. But he correctly held that "they have always been held to be the class of rights which the State governments were

rights named in the section.”⁵¹ If the amendment merely was declaratory of existing federal rights, no constitutional impediment to passage of the Bill existed. Yet the amendment was enacted in large part to allay gnawing doubts expressed by Bingham and others whether passage of the Bill was authorized by the Constitution.⁵² Finally, the privileges intended to be protected were deemed to be contained in the privileges or immunities clause, about which Justice Field, joined by three other dissenters, said, “In the first section of the Civil Rights Act Congress has given its interpretation of these terms, . . . the right ‘to make and enforce contracts,’ own property, and have access to the courts.”⁵³ The *Slaughter-House Cases* majority differed in taking a much narrower view of the amendment.

III. “PRIVILEGES OR IMMUNITIES”

It is time to compare the history of the “privileges or immunities” clause with Curtis’ version. The terms first appear in article IV of the Articles of Confederation: the people of the different states shall be “entitled to all privileges and immunities of free citizens in the several states,” specifying “all the privileges of trade and commerce,” which limited the general words “privileges and immunities.” The phrase was picked up by article IV of the Constitution, and very early the courts of Maryland and Massachusetts construed it in terms of trade and commerce.⁵⁴ For the Maryland court, Justice Chase declared that the words had a “particular and limited” meaning, that is, “acquiring and holding” property.⁵⁵ Next came the Civil Rights Bill of 1866: “[T]here shall be no discrimination in civil rights or immunities . . . but the inhabitants . . . shall have the same right to make and enforce contracts, to sue, . . . to . . . hold, and convey real and personal property,”⁵⁶ provisions plainly allied to trade and commerce.

created to establish and secure,” 83 U.S. (16 Wall.) 36, 76 (1872), and that this interpretation was not altered by the fourteenth amendment. Here he erred, for it was altered with respect to the “enumerated” privileges. See *infra* text accompanying notes 131–35. That is my central difference with Curtis.

Curtis also overlooks Senator Trumbull’s statement: “[A] man may be a citizen in this country without a right to vote” or other rights. GLOBE, *supra* note 27, at 1757.

51. GLOBE, *supra* note 27, at 1366. For further statements of Wilson, see *infra* text accompanying note 58; for those of Thayer, see *infra* text accompanying note 64.

52. GLOBE, *supra* note 27, at 429. Bingham “argued that Congress lacked the power to pass the Civil Rights Bill.” Curtis, *Bill of Rights*, *supra* note 1, at 78; see also, Curtis, *Further Adventures*, *supra* note 1, at 99. James Wilson, Chairman of the House Judiciary Committee, “recognized that congressional power to pass the bill was doubtful.” Curtis, *Bill of Rights*, *supra* note 1, at 76 (citing GLOBE, *supra* note 27, at 1115). True, a division of opinion on this score did exist, but the strength of that view forced adoption of the amendment. See statements of Broomall, *supra* text accompanying note 28. “To remove any doubt was one of the reasons the fourteenth amendment was passed.” Curtis, *Bill of Rights*, *supra* note 1, at 92.

53. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872). Grasping at straws, Curtis maintains that Field “was more cautious in his appraisal” because he added to the quoted material the statement “or at least has stated some of the rights which in its judgment these terms include.” Curtis, *Further Adventures*, *supra* note 1, at 121 (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J., dissenting)). That the framers believed their enumeration to be exclusive was stated unequivocally by Thayer and Wilson, and Field is to be credited no further than to the extent he reflects the legislative history.

54. *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797); *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, 92 (1827).

55. *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797).

56. GLOBE, *supra* note 27, at 474.

Curtis' mainstay, John Bingham, protested, however, that "civil rights and immunities" was "oppressive" because it was too broad; it could apply to "any of the civil rights of a citizen."⁵⁷ At Bingham's insistence the phrase was deleted in order, as James Wilson, manager of the Bill, explained, to obviate a "construction going beyond the *specific rights* named in the section," a "*latitudinarian construction not intended*."⁵⁸ One can only marvel that activists like Curtis insist on pouring their own aspirations into the Act in the face of these unmistakably restrictive assurances. Senator Trumbull, draftsman of the Bill, read the restrictive cases to the framers. Commenting on one, he said, it "enumerates the very rights . . . set forth in the first section of this bill."⁵⁹ Judge William Lawrence of Ohio, a leading legal theorist of the 39th Congress, noted that "the courts have by construction *limited* the words 'all privileges' to mean only '*some* privileges'"—those "confined to . . . the rights of protection of life and liberty, and to acquire and enjoy property."⁶⁰ Thus, the framers were aware that they were employing words of art. In *Yates v. United States*⁶¹ Justice Harlan stated, "[W]e should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation."⁶² In characteristic fashion Curtis disposes of Justice Harlan's comments on the pettifogging ground that "[s]uch a position is essential to Mr. Berger's case because, construed in its *ordinary* meaning," the phrase is broader.⁶³ But the point of *Yates* is that prior constructions leave no room for the "ordinary meaning," whether or not that ruling is "essential" to my case. Moreover, Martin Thayer assured the framers that "to avoid any misapprehension" about what the "fundamental rights of citizenship" are, "they are stated in the bill," which "define[s] with . . . particularity the civil rights and immunities which are to be protected by the bill [T]hat enumeration precludes any possibility that the general words . . . can be extended beyond the particulars which have been enumerated."⁶⁴ The "*sole* purpose of the bill," he emphasized, "is to secure" those "fundamental rights."⁶⁵ Senator William M. Stewart explained that the Bill was designed "simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage. It strikes at that; *nothing*

57. *Id.* at 1291 (emphasis added). "Civil rights and immunities, for Bingham, included *all* rights under state law as well and might affect schools, suffrage, as well as other subjects." Curtis, *Further Adventures*, *supra* note 1, at 111 (emphasis added). Bingham rejected the terms precisely for that reason.

58. GLOBE, *supra* note 27, at 1366 (emphasis added). See also the statements of Thayer and Wilson *supra* at text accompanying notes 51 & 64.

59. GLOBE, *supra* note 27, at 475.

60. *Id.* at 1835-36.

61. 354 U.S. 298 (1957).

62. *Id.* at 319.

63. Curtis, *Further Adventures*, *supra* note 1, at 94 (emphasis added).

64. GLOBE, *supra* note 27, at 1151. See also *supra* text accompanying note 44.

65. GLOBE, *supra* note 27, at 1152 (emphasis added). Immediately prior thereto he had explained "fundamental rights" in terms of "the right to make and enforce contracts" and so forth. *Id.* at 1151.

else That is the whole scope of the law.”⁶⁶ In an incautious moment Curtis observes of a proposal in the Joint Committee on Reconstruction—that the amendment prohibit “discrimination in civil rights”—that “[i]ts *general language failed to take account of and overrule the doctrine of Barron v. Baltimore* that the Bill of Rights did not limit the states.”⁶⁷

Curtis cannot, however, throw off the influence of Crosskey. For Crosskey the privileges or immunities of the fourteenth amendment had an “undeniably obvious”⁶⁸ meaning and purpose: to impose the Bill of Rights upon the states.⁶⁹ So Curtis—words of art being discredited because they served my thesis—concludes that “a *natural* reading of ‘privileges or immunities’ is that the phrase is equivalent to ‘rights.’ . . . These rights, literally understood, would include *all* rights of citizens provided for in the Constitution, including rights set out in the Bill of Rights.”⁷⁰ To begin with, a privilege, as Wesley Hohfeld taught, is both different and less than a right.⁷¹ So it appeared to Bingham. “Civil rights and immunities” had been deleted at his insistence because it “included *all* rights under state law”—for example, “suffrage” and “schools”;⁷² and he substituted “privileges” in the amendment, indicating that he too regarded “privileges” as narrower than “rights.” Curtis’ claim that privileges or immunities embraced “all rights” in the Constitution flies in the face of the framers’ *repeated rejection of attempts to end ALL discriminatory classification*,⁷³ a point Curtis studiously ignores. And his claim also runs counter to Thayer’s and Wilson’s assurances that the broader “civil rights and immunities” meant only the specifically enumerated rights⁷⁴—statements also disregarded by Curtis. It likewise collides with the Court’s statement in *Georgia v. Rachel*,⁷⁵ which Curtis again ignores, that the framers of the 1866 Act “intended to protect a *limited category of rights*.”⁷⁶ Why did the framers jettison this carefully “limited category of rights” when they turned to the fourteenth amendment, which was under consideration at the very same time? No activist, Curtis included, has ever explained this

66. *Id.* at 1785 (emphasis added).

67. Curtis, *Further Adventures*, *supra* note 1, at 113 n.179 (emphasis added).

68. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 6 (1954) (emphasis added).

69. *Id.*

70. Curtis, *Further Adventures*, *supra* note 1, at 92 (emphasis added). As Justice Harlan points out, Bingham, in the meetings of the Joint Committee on Reconstruction, was “successful in replacing § 1 of Owen’s proposal, which read: ‘No discrimination . . . as to the civil rights . . .’” with “‘abridge the privileges or immunities of citizens.’” *Oregon v. Mitchell*, 400 U.S. 112, 172 (1970) (Harlan, J., concurring in part and dissenting in part). He replaced civil rights with privileges.

71. W. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913).

72. Curtis, *Further Adventures*, *supra* note 1, at 111 (emphasis added). See also *GLOBE*, *supra* note 27, at 1291.

73. For citations, see BERGER, *GOVERNMENT*, *supra* note 17, at 163–64.

74. See, e.g., text accompanying notes 51 & 64.

75. 384 U.S. 780 (1966).

76. *Id.* at 791 (emphasis added). This statement was called to Curtis’ attention in Berger, *Incorporation*, *supra* note 1, at 440 n.44.

inconsistency. Actually, the framers deemed Act and amendment to be "identical."⁷⁷

Curtis suggests that Justice Cardozo used "privileges and immunities" as "encompassing the rights in the Bill of Rights."⁷⁸ But Justice Cardozo stated that some of "the privileges and immunities . . . have been *taken over* from the earlier articles of the federal bill of rights and *brought within* the Fourteenth Amendment by a process of absorption."⁷⁹ He did not rely on incorporation by the framers, but upon judicial "absorption," a take-over by the Court "in the belief that neither liberty nor justice would exist if they were sacrificed."⁸⁰ Of this "selective incorporation" Judge Henry Friendly wrote, "[I]t appears undisputed" that it has no "historical support . . . [T]he present Justices feel that if their predecessors could arrange for the absorption of some such provisions in the due process clause, they ought to possess similar absorptive capacity as to other provisions equally important in their eyes."⁸¹ These materials were spread before Curtis, who, though exercised that Crosskey should be ignored, resolutely shut his eyes to the unpalatable facts. Or is it more generous to conclude that he simply does not grasp the distinction between incorporation by the framers in the amendment and the long-delayed "absorption" by the Justices?

Curtis cites other cases for the proposition that the "privileges or immunities" clause encompassed "the rights in the Bill of Rights,"⁸² overlooking that in 1873 the *Slaughter-House Cases*⁸³ gutted the clause and that *Adamson v. California*⁸⁴ rejected Justice Black's attempt to read the Bill of Rights into the fourteenth amendment. Curtis notes that in 1876 *United States v. Cruikshank*⁸⁵ held that

the right of peaceable assembly and the right to bear arms were not privileges secured by the fourteenth amendment. . . . In April of that year in *Walker v. Sauvinet* the Court held that the seventh amendment right to trial by jury was not a privilege or immunity of national citizenship protected by the fourteenth amendment [T]he decisions in *Cruikshank* and *Walker* were unequivocal.⁸⁶

To be sure, Curtis regards these cases as a "remarkable transformation,"⁸⁷ but his Crosskeyan interpretation of the history is badly skewed. And if we are to look to the cases, the contemporary decisions should carry the greater weight, for it has long been established that contemporary Justices were

77. See *supra* text accompanying notes 23-36.

78. Curtis, *Further Adventures*, *supra* note 1, at 92.

79. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (emphasis added).

80. *Id.*

81. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934-35 (1965).

82. Curtis, *Further Adventures*, *supra* note 1, at 92.

83. 83 U.S. (16 Wall.) 36 (1872).

84. 332 U.S. 46 (1947).

85. 92 U.S. 542 (1876).

86. Curtis, *Further Adventures*, *supra* note 1, at 119 (footnote omitted).

87. *Id.*

better aware of the draftsmen's purposes than later courts.⁸⁸ Activist enthusiasts are apt to forget that even with respect to free speech the Supreme Court, as late as 1922, held that the Constitution "imposes upon the States no obligation to confer upon those within their jurisdiction . . . the right of free speech."⁸⁹

Curtis charges me with a "strained and bizzare [*sic*] reading"⁹⁰ of Bingham's statement:

Gentlemen admit the force of the *provisions* in the bill of rights, *that* the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, *and that* no person shall be deprived of life, liberty or property without due process of law⁹¹

My reading of this statement, allegedly, is an "edited version":

Bingham translated the provisions of "article IV that 'the citizens of *each state* shall be entitled to all privileges and immunities of citizens in the several States' as 'the provisions *in the bill of rights* that citizens *of the United States* shall be entitled to all privileges and immunities of citizens of the United States'" Mr. Berger then comments, "The Bill of Rights contains no privileges and immunities provision." Bingham never said it did.⁹²

Curtis maintains that the "second item in the series *seems clearly* to be Bingham's summary, not of the Bill of Rights, but of the privileges and immunities clause."⁹³ This is passing strange. "Each *that*-clause is, or at the least may be meant as, defining" the antecedent⁹⁴—that is, the "provisions" *that* entitle citizens to privileges and immunities, and to due process, the third item. It is Curtis' divorce of "that" from its antecedent that is bizarre, for the inescapable implication is that Bingham *did* say that the Bill of Rights entitles citizens of the United States to the privileges and immunities of citizens of the United States.

Like Bingham, Curtis persists in converting the article IV citizens of "each State" into citizens of the United States: "Bingham, of course, read the article IV provision to mean that 'the citizens of each state (being *ipso facto* citizens of the United States) shall be entitled to all privileges and immunities of citizens (*supplying* the ellipsis 'of the United States in the several states')'."⁹⁵ When article IV first was formulated, however, the concept of United States citizenship was yet aborning. And, said the Supreme

88. See *supra* note 50.

89. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 538 (1922). For the subsequent "remarkable transformation," see BERGER, *GOVERNMENT*, *supra* note 17, at 270-72.

90. Curtis, *Further Adventures*, *supra* note 1, at 108.

91. GLOBE, *supra* note 27, at 1089 (emphasis added).

92. Curtis, *Further Adventures*, *supra* note 1, at 108 (quoting Berger, *Incorporation*, *supra* note 1, at 450 (emphasis in original)).

93. Curtis, *Further Adventures*, *supra* note 1, at 109 (emphasis added).

94. H. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* 639 (1926).

95. Curtis, *Further Adventures*, *supra* note 1, at 97 (emphasis added) (quoting GLOBE, *supra* note 27, at 158).

Court, "[T]he text of Article IV, section 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations"⁹⁶ Curtis' reference to the "somewhat different language of article IV" from that of the fourteenth amendment⁹⁷ fails to make clear that the former referred to citizens of "each State," not to citizens of the United States, a difference appreciated by the framers who made blacks "citizens of the United States *and* of the State wherein they reside." If article IV already comprehended citizens of the United States, the privileges or immunities clause of the amendment was superfluous. What matters it that "[a]s written, the fourteenth amendment was essentially equivalent to Bingham's reading of article IV,"⁹⁸ when the amendment testifies that it was deemed to supply something that previously was missing? Curtis concedes that Bingham's reading of article IV as "including those [privileges and immunities] in the Bill of Rights . . . may well have been incorrect,"⁹⁹ a "radically unorthodox reading of the original Constitution."¹⁰⁰ Consequently, it was incumbent upon Bingham to explain his "radically unorthodox reading" to his fellows in words that elucidated it "too clearly to admit of doubt."¹⁰¹ It cannot be assumed that they understood his "radically unorthodox reading" to repudiate standing law; that requires proof.

Since Bingham is a mainstay of Curtis' argument, it will profit us to sample the quality of his thinking. Even Crosskey remarked that "ardent men like John A. Bingham are sometimes guilty of slips and lapses, too."¹⁰² One such "lapse" was his citation to the fifth amendment for his draft amendment provision: for "all persons in the several States *equal protection* in the rights of life, liberty, and property." This, he said, "stands in the very words of the Constitution. . . . Every word . . . is today in the Constitution"¹⁰³ "Every word" was *not* "in the Constitution"—equal protection was altogether missing. Again, when Bingham grasped that *Barron v. Baltimore*¹⁰⁴ held the Bill of Rights inapplicable to the states, he loftily declared that "they are nevertheless to be enforced and observed in [the] States by the grand utterance of that immortal man, who, while he lived, stood alone in intellectual power among the living men of his country, and now that he is dead,

96. *United States v. Wheeler*, 254 U.S. 281, 294 (1920).

97. Curtis, *Further Adventures*, *supra* note 1, at 92.

98. *Id.* at 109.

99. Curtis, *Bill of Rights*, *supra* note 1, at 86.

100. *Id.* at 92 (footnote omitted).

101. The Supreme Court, per Justice Miller, refused to embrace a construction of the fourteenth amendment that would subject the states' local concerns to "the control of Congress . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872). For the *Adamson* Court's approval, see *supra* note 50.

102. Crosskey, *Charles Fairman*, "Legislative History," and *the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 37 (1954).

103. *GLOBE*, *supra* note 27, at 1034.

104. 32 U.S. (7 Pet.) 243 (1833).

sleeps alone in his honored tomb by the sounding sea"¹⁰⁵—namely, Daniel Webster. A decision of the Supreme Court, in short, must yield to Webster's "grand utterance"! One need not brand Bingham a "moron";¹⁰⁶ it suffices that he was ever a stump speaker, substituting rhetoric for lawyerly analysis.

Curtis avers that Bingham "did not agree that *Barron v. Baltimore* had been correctly decided" because he "believed the states were required to obey the Bill of Rights by the oath state officers took to support the Constitution."¹⁰⁷ This is a pretty example of circular reasoning, of assuming the answer. Only if the states were bound by the Bill of Rights did the "oath" come into play. Hence, Crosskey tells us, "Bingham actually drew" a draft of section one of the fourteenth amendment "upon the assumption that his own constitutional ideas and those of [some of] his Republican brethren, and *not* the Supreme Court's constitutional decisions, were the standing law."¹⁰⁸ One cannot assume that the "brethren" overruled a constitutional decision sub silentio. When they deemed it necessary to overrule *Dred Scott*, the framers, Curtis observes, "explicitly wrote national citizenship . . . into the fourteenth amendment."¹⁰⁹ He does not answer the question, "[W]hy did they not 'explicitly' write the Bill of Rights into the amendment?"¹¹⁰

Let me now illustrate how Curtis' preference for generalities over particulars repeatedly leads him astray. He quotes Justice Bradley: "[T]he fourteenth amendment . . . demands that the privileges and immunities of all citizens shall be absolutely unabridged [and] unimpaired"; they are privileges "of an absolute and not merely relative character."¹¹¹ But this sheds no light on the *content* of those privileges. Justice Bradley himself did so in 1870: "[T]he civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment . . . [It] was in *pari materia*; and was probably intended to reach the same object . . . [T]he first section of the *bill covers the same ground* as the fourteenth amendment . . ."¹¹² Again, Curtis would discredit my citation of Trumbull: the "great fundamental rights *set forth* in this bill" include "the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."¹¹³ Curtis comments, "Mr. Berger uses this quotation to

105. GLOBE, *supra* note 27, at 1090.

106. Curtis, *Further Adventures*, *supra* note 1, at 108. Is it unreasonable to say of one who located "equal protection" in the due process clause of the fifth amendment that he was unable to understand what he read? See *id.*

107. *Id.* at 109 (emphasis added).

108. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 25 (1954) (emphasis in original).

109. Curtis, *Bill of Rights*, *supra* note 1, at 97.

110. Berger, *Incorporation*, *supra* note 1, at 453.

111. Curtis, *Further Adventures*, *supra* note 1, at 93-94 (quoting *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652-53 (C.C.D. La. 1870) (No. 8,408)).

112. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408) (emphasis added).

113. Berger, *Incorporation*, *supra* note 1, at 440 (emphasis added) (quoting GLOBE, *supra* note 27, at 475).

prove there was no room left in the *privileges and immunities clause of the fourteenth amendment* for Bill of Rights liberties."¹¹⁴ That inference is fortified by another Trumbull statement that citizenship "carrie[d] with it . . . fundamental rights . . . such as the rights *enumerated* in this bill."¹¹⁵ "Such" means "of the same kind of class,"¹¹⁶ a meaning buttressed by Thayer's and Wilson's assurances that the enumeration of particulars excluded the unmentioned.¹¹⁷ Curtis' divide-and-conquer strategy beclouds the need for viewing each bit of the evidence in light of the mass of confirmatory facts. If, as is undeniable, the framers regarded the Act and the amendment as identical, as Justices Bradley and Field confirmed,¹¹⁸ exclusion of the unmentioned is unimpeachable. The qualification of the general by the particular¹¹⁹ ever escapes Curtis.

Curtis rings the changes on the repeated references in the debates to "life, liberty, or property,"¹²⁰ as if he had discovered some new Atlantis. But he persistently neglects to inquire what the *framers*—not Curtis—understood by those terms. Thus, he cites Wilson's reference to the "civil rights"¹²¹ of the Civil Rights Bill as rooted in the fifth amendment's "no person shall be deprived of life, liberty, or property without due process of law."¹²² But in explaining the "great fundamental rights" to the framers, Wilson read the Blackstonian triad to them: (1) "The right of personal security" (enjoyment of life and limb); (2) "[t]he right of personal liberty," consisting in "the power of locomotion," of moving "without . . . restraint"; and (3) "the right of personal property."¹²³ And he added, "[T]hese are the rights which this bill proposes to protect"¹²⁴

With heavy-handed sarcasm Curtis derides my reading that "the framers of the fourteenth amendment thought the rights to liberty, security, and property were so inclusive that they included the right to testify, inherit, and

114. Curtis, *Further Adventures*, *supra* note 1, at 102 (emphasis in original).

115. *Id.* (emphasis added) (quoting GLOBE, *supra* note 27, at 1757).

116. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1970).

117. See *supra* text accompanying notes 58 & 64.

118. See *supra* text accompanying notes 36 & 53.

119. This is a variant of the rule that "[s]pecific terms prevail over the general in the same or another statute" *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). In THE FEDERALIST NO. 41, at 268–69 (Mod Lib. ed. 1937), Madison said: "[S]hall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any significance whatsoever?"

120. Curtis, *Further Adventures*, *supra* note 1, at 95, 100.

121. *Id.* (quoting GLOBE, *supra* note 27, at 1294).

122. *Id.* Wilson was mistaken in believing that the fifth amendment applied to the states. Even Bingham came to understand that such views ran counter to *Barron v. Baltimore*, see GLOBE, *supra* note 27, at 1089–90, and insisted that the Civil Rights Bill was unconstitutional, *supra* note 52. Many of the framers agreed with him and, therefore, enacted the fourteenth amendment. BERGER, GOVERNMENT, *supra* note 17, at 23 n.12. Curtis' citation of Wilson's statement that the Constitution "is the never-failing fountain from which we may draw for the passage of this bill," Curtis, *Further Adventures*, *supra* note 1, at 95 (quoting GLOBE, *supra* note 27, at 1118), did not represent the considered judgment of the framers.

123. GLOBE, *supra* note 27, at 1118. See also BERGER, GOVERNMENT, *supra* note 17, at 21–22.

124. GLOBE, *supra* note 27, at 1117. See also Curtis, *Bill of Rights*, *supra* note 1, at 78. For the rights the Founders had in mind, they looked to "the common law, as expounded by Coke and Blackstone. . . . The 'rights of Englishmen' were not vacuous; instead they were quite well defined and specific." Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119, 154–55.

contract, but were so narrow that they excluded the rights in the Bill of Rights."¹²⁵ The rights to testify, inherit, and contract had been enumerated expressly; the Bill of Rights was unmentioned. Curtis does not appreciate Judge Lawrence's emphasis that "[i]t is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live," and to "make a contract" for his labor.¹²⁶ A person's rights to testify and to sue were meant to provide protection against oppression and to secure the profits of his labor and property. Provision for equal access to the courts was not meant to authorize federal restructuring of state judicial proceedings. To the contrary, Trumbull twice assured the framers that if a state did not discriminate the bill "will have no operation,"¹²⁷ a point also made by Shellabarger,¹²⁸ utterances that Curtis persistently ignores. These statements alone bar imposition of the Bill of Rights on the states.

The right to inherit was an age-old incident of the right to own property and thus falls squarely within the meaning of "life, liberty, or property." Curtis remarks, "Mr. Berger chooses to look at these *incidents*, not the overarching principles from which they were derived."¹²⁹ Resort to "overarching" principles does not expand "life, liberty, or property" beyond the Blackstonian confines to which Wilson directed the framers' attention. The right to locomotion without restraint does not secure free speech; protection of life and limb does not guarantee against excessive bail for a murderer; the right to own property does not ensure trial by jury in a suit concerning more than twenty dollars. These were additional rights embodied by the Founders in the Bill of Rights. Curtis' preference for the general over the particular leads him into a welter of misapprehensions. As John Hart Ely observed, "[B]y favoring . . . the 'general over the particular,' . . . one can convince oneself that some invocable consensus supports almost any position"¹³⁰

The contemporary *Slaughter-House Cases* summed up: article IV "did not profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare" that the rights granted to its "own citizens . . . shall be the measure of the rights of citizens of other States" who entered the jurisdiction.¹³¹ "[U]p to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on

125. Curtis, *Further Adventures*, *supra* note 1, at 95.

126. GLOBE, *supra* note 27, at 1833.

127. See *supra* note 42.

128. Shellabarger said of the Civil Rights Bill, "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights . . . are imposed by State laws shall be for and upon all citizens alike" GLOBE, *supra* note 27, at 1293.

129. Curtis, *Further Adventures*, *supra* note 1, at 96 (emphasis in original).

130. J. ELY, *DEMOCRACY AND DISTRUST* 67 (1980). Terrance Sandalow likewise observes with reference to "understanding the intentions of the framers" that "[b]y wrenching the framers' 'larger purposes' from the particular judgments that revealed them, we incur a loss of perspective. . . . In freeing ourselves from those judgments we are not serving larger ends determined by the framers but making room for the introduction of contemporary values." Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981).

131. 83 U.S. (16 Wall.) 36, 77 (1872).

the Federal government for their existence or protection.”¹³² With the exception of a few specific restrictions, “the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government.”¹³³ And the Court denied that it was the purpose of the privileges or immunities clause “to transfer the security and protection of all the civil rights . . . from the States to the Federal government.”¹³⁴ That statement faithfully reflects the legislative history of the amendment. And the decision never has been overruled, so that the privileges or immunities clause has virtually been a dead letter.¹³⁵

IV. THE BLAINE AMENDMENT

A final example of Curtis’ superficial skimming of historical materials—his treatment of the Blaine Amendment of 1875—is worth examining if only to clarify an important constitutional and historical event. As Curtis relates, “The Blaine Amendment had been proposed as a result of concern with the use of public funds for sectarian schools. Among other things, it prohibited states from establishing religion or interfering with free exercise of religion.”¹³⁶ The Blaine Amendment constitutes striking, contemporary testimony that the fourteenth amendment was not considered to embrace the Bill of Rights. Quoting from Francis O’Brien, I set out,

Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. . . . Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Eaton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.¹³⁷

The evidence, as will appear, actually is stronger than O’Brien indicates. Curtis comments,

Randolph, Christiancy, Kernan, Whyte, Bogy, and Eaton were Democrats who spoke *ten years after* the fourteenth amendment debates. Four of them opposed the Blaine Amendment, and several of them suggested that it would violate states rights to require the states to obey the religious guarantees of the first amendment.¹³⁸

The “several” states rights advocates confirm Blaine’s reason for submitting the amendment: the fourteenth amendment did not forbid states to establish

132. *Id.*

133. *Id.*

134. *Id.*

135. A. SAYE, *AMERICAN CONSTITUTIONAL LAW* 559 (1979).

136. Curtis, *Further Adventures*, *supra* note 1, at 114.

137. Berger, *Incorporation*, *supra* note 1, at 464 (quoting F. O’BRIEN, *JUSTICE REED AND THE FIRST AMENDMENT* 116–17 (1958)). Curtis quotes this material in Curtis, *Further Adventures*, *supra* note 1, at 114–15.

138. Curtis, *Further Adventures*, *supra* note 1, at 115 (emphasis in original) (footnotes omitted).

official churches. Blaine was among 23 members of the 1875 Congress who had been members of the 39th Congress,¹³⁹ and their actions and testimony wash out what little weight may attach to the remarks of Bingham and Howard, on which Justice Black built his "incorporation" theory.

Consider Curtis' dismissal of the Democratic opponents. Senator Frelinghuysen, an 1866 framer, said that "the *people call* for an amendment . . ."; the House—two-thirds Democratic—"by a vote of 166 out of 171 (only 5 negatives) declared that to be the will of the people," so that "[t]he House article very properly *extends* the prohibition of the first amendment . . . to the States."¹⁴⁰ Senator Randolph, one of Curtis' Democrats, said the Blaine Amendment had won "praise and approval from one end of the country to the other."¹⁴¹ These remarks demonstrate the *people's* belief that the fourteenth amendment had left state control of religion untouched.

The Senate Judiciary Committee reported the bill favorably;¹⁴² Judge William Lawrence, who played a leading role in the 1866 Congress, said, "I shall vote for this resolution to submit to the States the proposed amendment to the Constitution . . ."¹⁴³ But the debate bogged down on whether a Senate amendment to the Blaine proposal was preferable,¹⁴⁴ whether enforcement power should be lodged in Congress,¹⁴⁵ and on various objections to financial considerations,¹⁴⁶ behind which lurked anti-Catholic feeling.¹⁴⁷ The 1864 encyclical of Pope Pius IX was read to the Senate; it condemned such "rash assertions" as "liberty of conscience" and the theory that "popular schools . . . should be free from all ecclesiastical authority . . ."¹⁴⁸ That position could not very well be defended by American Catholics who, therefore, were impelled to remove the issue from politics by assenting to an amendment. Although Senator Christiancy, another of Curtis' Democrats, objected that the taxation provision should apply to private as well as public schools, he said that the establishment provision "is simply imposing on the States what the Constitution already imposes on the United States, and that is all correct."¹⁴⁹ So too, Senator Kernan, also disparaged by Curtis as a Democratic opponent, said the establishment provision "has my most hearty commendation."¹⁵⁰ To brush these men off as Democrats and "opponents," therefore, is misleading. Not one member, so far as I could find, affirmed that the matter was already covered by the fourteenth amendment. One and all, in one form or another, considered that it was not.

139. J. MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 154 (1971).

140. 4 CONG. REC. 5561 (44th Cong., 1st Sess. (1876)) (emphasis added). Senator Morton, a Republican, said the House "has nearly a two-thirds democratic majority," *id.* at 5593, a fact acknowledged by Senator Eaton, a Democrat. *Id.*

141. *Id.* at 5454.

142. *Id.* at 5357.

143. *Id.* at 5190.

144. *Id.* at 5593.

145. *Id.* at 5190.

146. *Id.* at 5593. The financial issue crowded the pages of the debate. See, e.g., *id.* at 5594.

147. E.g., *id.* at 5190.

148. *Id.* at 5587-88.

149. *Id.* at 5245.

150. *Id.* at 5581.

Virtually the only opposition to Blaine's establishment clause came from the "several . . . [who] suggested that it would violate state rights."¹⁵¹ Thus Senator Bogy stated, "I am opposed to this amendment because . . . it takes from the State that which belongs to it, and for no other reason,"¹⁵² confirming Blaine's testimony that states had been unaffected by the fourteenth amendment.¹⁵³ Senator Morton of Indiana, an 1866 framer, insisted on putting the "no State shall establish" into the Constitution.¹⁵⁴ Senator Randolph, one of Curtis' Democrats, who said he "had anxiously worked for the amendment adopted by the House," stated "most men believe" that the House version "is effective and quite good enough."¹⁵⁵ Another Curtis Democrat, Senator Kernan, likewise was in its favor.¹⁵⁶ Indeed, Senator Edmunds considered that sentiment to be the position "taken by the whole body of our brethren on the other side of the Chamber,"¹⁵⁷ their weakness being a "blind adoration . . . for this House proposition."¹⁵⁸ Despite differences respecting financial treatment of the schools and the enforcement power, the Senate voted for the amendment twenty-seven to sixteen, failing to meet the two-thirds vote required.¹⁵⁹

Regarding our central issue—does the fourteenth amendment incorporate an establishment of religion clause—the Blaine Amendment postulated that it did not and proposed to fill the gap. Although Curtis' attempt to undermine the effect of the Blaine Amendment merely reveals the hand of a tyro, he unwittingly has performed a service by prompting a search of its legislative history. That history unmistakably discloses that the people, the House all but unanimously, and the Senate, by an almost two to one vote, considered that the fourteenth amendment did not comprehend the first. In brushing off such evidence, Curtis once more reveals his incapacity to weigh evidence and his addiction to a Crosskeyan "incorporation" theory, positing that he, better than the 23 framers, knows what the 1866 Congress intended.

V. CONCLUSION

In his famous attempt to read corporations out of the fourteenth amendment Justice Black, who—not Crosskey—gave birth to the "incorporation" theory, stated that "the people were not told . . . they [were ratifying] an amendment granting new and revolutionary rights to corporations."¹⁶⁰ The

151. Curtis, *Further Adventures*, *supra* note 1, at 115.

152. 4 CONG. REC. 5591 (1876).

153. Berger, *Incorporation*, *supra* note 1, at 464.

154. 4 CONG. REC. 5585 (1876).

155. *Id.* at 5586.

156. *See supra* text accompanying note 150.

157. 4 CONG. REC. 5586 (1876).

158. *Id.* at 5588.

159. *Id.* at 5457.

160. *Connecticut Gen. Ins. Co. v. Johnson*, 303 U.S. 77, 86 (1938) (dissenting opinion). Justice Field, dissenting in *Ex parte Virginia*, 100 U.S. 339, 362–63 (1879), stated that the provision for Negro jurors was "a change so radical . . . [as] was never contemplated by the recent amendments. The people in adopting them did

restructuring of state procedures, such as grand jury indictments, was even more "revolutionary," and that possibility, Fairman concluded, was likewise not revealed to the people:

I traced all the records that are available. . . . Governor after governor, submitting the proposed amendment, commented on its purpose, but never was it suggested that the federal Bill of Rights would now govern the state. . . .

If the proposed Fourteenth Amendment had been understood to impose the Bill of Rights, surely the legislatures of states whose constitution or laws would be struck down would have so noted, and stopped to consider, before voting to ratify.¹⁶¹

This is the more remarkable because, as James Blaine recorded of the "limited categories" Civil Rights Bill, "It required potent persuasion, re-enforced by the severest exercise of party discipline, to prevent a serious break in both Houses against the bill."¹⁶²

Bearing in mind that the purpose of the framers was to secure the emancipated slaves from violence and oppression and to safeguard their rights to exist and make a living, the omission to call to each state's attention that it was surrendering its control of grand juries, of non-use of indictments, and other preliminaries to trial, is powerful evidence that no such intention existed. Crosskey concedes that the contemporary courts "should have given heed to this fact, but did not"; they were "unaware of the true tenor of the new amendment. . . . [This is] a rather shocking, but by no means unique, indication of the inalertness of the men who composed the Court of the period!"¹⁶³ This about Justice Miller, who had his roots in Iowa politics and kept his political antennae attuned to the passing scene.¹⁶⁴ What the contemporaries of the amendment "shockingly" failed to perceive is an open book to Crosskey and Curtis, a splendid illustration of their bondage to an *idée fixée*.

not suppose they were altering the fundamental theory of their dual system of governments." Actually, the framers were assured that no intention existed to alter the exclusion of Negro jurors. See BERGER, GOVERNMENT, *supra* note 17, at 27, 163.

161. Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144, 154 (1954). Justice Harlan asked, "Can it be seriously contended that the legislatures of these States, . . . would have ratified an amendment which might render their own States' constitutions unconstitutional?" *Reynolds v. Sims*, 377 U.S. 533, 603 (1964) (dissenting opinion).

162. 2 J. BLAINE, TWENTY YEARS OF CONGRESS 171 (1886) (quoted in H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 19 n.22 (1908)).

163. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 113 (1954).

164. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT *passim* (1939). See the Court's comment in *Adamson v. California*, *supra* note 40.

